No. 20788

In the United States Court of Appeals for the Ninth Circuit

FRANCES T. HONG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR THE APPELLEE

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CITATIONS

213-047—66——1

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OPINION BELOW

The findings of fact and conclusions of law (I–R. 3–27)[1] and oral opinion (II–R. 141–145) of the District Court are not officially reported.

JURISDICTION

This appeal involves federal excise taxes for the quarters included in the years 1955 through 1960. The taxes in dispute amount to $4,692.18, with interest of $598.53, and were paid on December 15, 1960, and February 8, 1961. (I–R. 25.) Claims for refund for the years 1956 through 1960 were filed on November 7, 1961. (I–R. 3, 6, 13.) A claim for refund for

[1] "I–R." and "II–R." references are to Volume I and Volume II, respectively, of the record on appeal.

the year 1955 and amended claims for the years 195 and 1960 were filed on November 20, 1962. (I–R 8–9.) On August 15, 1963, within the time provide by Section 6532, Internal Revenue Code of 1954, th taxpayer brought this action in the District Court fo recovery of the taxes paid. (I–R. 1–9, 25.) Jurisdic tion was conferred on the District Court by 28 U.S.C. Section 1346. The judgment of the District Court wa entered on October 5, 1965. (I–R. 28–29.) Within 6 days thereafter, on November 30, 1965, a notice o appeal was filed. (I–R. 30–31.) Jurisdiction is con ferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly found tha uli-ulis, which are used to provide a rhythmica accompaniment primarily for dances and occasionall otherwise, were musical instruments within the mean ing of Section 4151 of the Internal Revenue Cod of 1954 and the pertinent Treasury Regulations.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

CHAPTER 32—MANUFACTURERS EXCISE TAXES

* * * * *

Subchapter C—Entertainment Equipment

* * * * *

PART II—MUSICAL INSTRUMENTS

SEC. 4151. IMPOSITION OF TAX.

There is hereby imposed upon the sale of musical instruments by the manufacturer, pro-

ducer, or importer a tax equivalent to 10 percent of the price for which so sold.

(26 U.S.C. 1958 ed., Sec. 4151.)

Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code):

SEC. 40.4151–1 *Imposition and rate of tax.*

* * * * *

(c) *Definition of musical instruments.* The term "musical instruments" includes all wind, reed, string, percussion or electronic instruments used to produce music, including but not limited to all types of pianos and organs, trombones, saxophones, violins, drums, xylophones, chimes, cymbals, bongos, castanets, maracas, claves, etc. The term does not include articles in the nature of toys or novelties which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music.

(26 C.F.R., Sec. 40.4151–1.)

Section 48.4151–1(d) of Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code), effective for the taxable years 1959–1960, is identical.

STATEMENT

The facts found by the District Court (I–R. 24–26), some of which were stipulated (I–R. 20–21), may be summarized as follows:

Frances T. Hong (hereafter referred to as the taxpayer), doing business as Musical Sales Company in Wailuku, Maui, manufactures and sells an instrument

known as an uli-uli. (I–R. 24–25.) It is a polished gourd partially filled with seeds, attached to a handle, and decorated with dyed feathers. It is utilized to provide rhythm, a basic component of music, to accompany a hula, chant, or song.[2] In the overwhelming majority of cases during the taxable period in question, insofar as the evidence of public performances indicates, the uli-uli was used by hula dancers rather than by non-dancing musicians and was used both to provide such rhythmical accompaniment and as part of the visual aspects of the dance. The instrument has been used in orchestral arrangements and on commercially-sold phonograph records. (I–R. 25–26.)

The uli-uli is recognized as a musical instrument in historical works on the musical instruments of old Hawaii. It is so recognized in a German dictionary considered to be the leading authority in the field of musical instruments. Students and experts in the field of music also regard it as a musical instrument. (I–R. 26.)

In musicology, the uli-uli is defined as a percussive instrument of indefinite pitch, a classification which includes such instruments as castanets, maracas, cymbals, triangles, the bass drum, etc. The uli-uli is also classified, according to acoustical principles, as an idiophonic instrument, a classification which also includes castanets and maracas. The uli-uli is similar in construction, character, and use to maracas, except

[2] The taxpayer also makes a uli-uli of inferior quality and of smaller size which is designed for sale to tourists as souvenirs. This case is not concerned with them. (I–R. 25.)

that maracas are more often used by members of a band or orchestra than by dancers. (I–R. 26.)

The uli-uli is suitable for, and is used in, performing musical compositions both written and unwritten, and is suitable for use in, and is used in, instructing in music. (I–R. 26.)

Its adornment by colorful feathers, and even its use in the overwhelming majority of acts in public performances as part of the visual aspects of the hula or dance, do not change its character as a musical instrument. (I–R. 26.)

The taxpayer did not report and pay manufacturers excise tax on her sales of uli-ulis and she did not pass such taxes on to her customers. The Commissioner of Internal Revenue, through his delegates, determined that the higher quality uli-ulis manufactured and sold by the taxpayer were subject to excise tax. The Commissioner assessed the taxpayer for excise taxes for the taxable quarters commencing with the quarter ended March 31, 1955, though the quarter ended June 30, 1960, amounting to $4,412.32, with interest of $598.53. The taxpayer paid this assessment on December 15, 1960. The taxpayer filed a return for the taxable quarters ended September 30, 1960, and December 31, 1960, reported sales of uli-ulis determined by the Commissioner to be taxable, and paid $279.86 in tax on February 8, 1961. (I–R. 25.)

The taxpayer filed timely claims for refund, or amended claims for refund, contending that the uli-ulis in question were not taxable as musical instruments. Thereafter, the taxpayer timely commenced this action for refund. (I–R. 25.)

The District Court, sitting without a jury, after hearing the evidence and viewing the demonstrations (II–R. 1–136), at the conclusion of the trial rendered an oral opinion holding that the uli-ulis in question were musical instruments (II–R. 141–145). The court noted (II–R. 141–142, 143):

> In the light of the historical origin of the instrument in this case involved and other testimony which seems to indicate and which does indicate that it was used by Hawaiians from very early times to produce rhythm for the purpose of dancing, and to produce it, sometimes, not necessarily by the dancers themselves, although I am not sure that that is an absolutely valid distinction; plus the other testimony which has been given here; plus the demonstrations made; I can't help but feel that this is a musical instrument; that it falls on the musical instrument side, although it is one of those close-to-the-border-line questions.
>
> * * * * *
>
> It produces, certainly, a very distinctive rhythm; and I believe the testimony, as well as what I believe to be general knowledge—which I hope I possess—in accordance with what is possessed by the average man with a musical or semi-musical ear, I believe that the effect is musical and music that is composed partly of rhythm; and to that extent, it also satisfies the requirement of music.
>
> But this particular sound [of the uli-uli], to me at least—and I think to the average man in the street—does have the sound of a musical rhythm, and is always used in connection with a musical cadenza or musical rhythm; certain

types of timing which are distinctive to the Hawaiian hulas used in 1955 and today.

After a subsequent oral hearing on proposed findings of fact and conclusions of law, the District Court made formal findings of fact and conclusions of law. (I–R. 23–27). The court entered judgment for the Government. (I–R. 29.) The taxpayer appeals from this judgment. (I–R. 31.)

SUMMARY OF ARGUMENT

Section 4151 of the 1954 Code imposes a 10 percent manufacturers excise tax on musical instruments. Under the pertinent Treasury Regulations, the term "musical instrument" is defined to include all instruments which produce music except toys or novelties (i.e., articles which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music).

The instrument here involved is the Hawaiian uli-uli—a polished gourd, partially filled with seeds, attached to a handle, and adorned with feathers. The taxpayer manufactures three types of uli-ulis. The larger and better constructed ones are the ones with which this case is concerned; the third type, which is not taxed, is smaller and of a cheaper construction and is designed for sale as tourist souvenirs.

The question whether these uli-ulis are musical instruments or not is a factual question requiring the consideration and evaluation of a broad range of facts. The record clearly indicates that the uli-uli is used to provide a rhythmical accompaniment to a hula, chant, or song. Uli-ulis are similar in con-

struction and use to maracas. They are also used by hula dancers in the same way that Spanish dancers use castanets. Both maracas and castanets are expressly considered by the Treasury Regulations to be musical instruments. Moreover, uli-ulis are considered by students and experts in the field of music to be musical instruments. They are not toys or novelties which simulate the real instrument such as the souvenir instruments do; they are the genuine article. The record amply supports the District Court's findings and the court applied the proper standard. Contrary to the taxpayer's assertion, the court did not err in admitting evidence of the historical use and tradition of the instrument and can hardly be deemed to have committed reversible error by doing so.

The findings of the District Court should be affirmed; it is supported by substantial evidence and is not clearly erroneous.

ARGUMENT

The District Court correctly held that uli-ulis are musical instruments within the meaning of Section 4151 of the 1954 Code and the pertinent regulations

The question presented by this case is whether the District Court correctly held that uli-ulis—polished gourds partially filled with seeds and decorated with feathers, and used to provide a rhythmical accompaniment to a hula, chant, or song—are musical instruments subject to the federal excise tax. Chapter 32 of the Internal Revenue Code of 1954 deals with manufacturers excise taxes. Subchapter C of Chapter 32 is titled "Entertainment Equipment";

Part 2 of subchapter C, entitled "Musical Instruments", contains Section 4151, *supra,* which provides:

> There is hereby imposed upon the sale of musical instruments by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold.[3]

The 1954 Code provides no all inclusive definition of the term musical instrument. The Secretary of the Treasury, pursuant to his authority under Section 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7805), promulgated Section 40.4151–1, *supra,* of Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code). That section states:

> (c) Definition of musical instruments. The term "musical instruments" includes all wind, reed, string, percussion or electronic instruments used to produce music, including but not limited to all types of pianos and organs, trombones, saxophones, violins, drums, xylophones, chimes, cymbals, bongos, castanets, maracas, claves, etc. The term does not include articles in the nature of toys or novelties which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music.

This definition, which the taxpayer does not question, either in her claims for refund, at trial, or here,

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[3] The excise on musical instruments came into the revenue laws in 1941 when Section 545 of the Revenue Act of 1941, c. 412, 55 Stat. 687, added subsection (d) to Section 3404 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 3404). Section 3404(d) of the 1939 Code and Section 4151 of the 1954 Code are substantially identical.

has the effect of law. *Commissioner* v. *South Texas Co.,* 333 U.S. 396, 501; *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 378.

The District Court, sitting without a jury, after hearing testimony and viewing the demonstrations, held that the uli-ulis in question are musical instruments subject to tax. (I–R. 26–27; II–R. 141–145.) On appeal, the taxpayer contends that the District Court erred in that: (1) Its determination that uli-ulis are musical instruments within the meaning of the statute and the Regulations is contrary to the evidence, (2) it applied an erroneous standard to the facts, and (3) it erroneously admitted evidence of the historical use and background of the uli-uli in Hawaii. (Br. 2–4.)

We submit that the District Court's findings, both evidentiary and ultimate, are supported by the record; it applied proper legal standards; and it committed no error, certainly no reversible error, in the admission of evidence.

A. The finding of the District Court is supported by substantial evidence and is not clearly erroneous

The question whether the instruments manufactured by the taxpayer are musical instruments within the meaning of Section 4151 is essentially one of fact which is to be resolved by the trier of fact by application of the proper standard to the relevant evidence. Given the broad character of the statutory term "musical instruments" and the numerous instruments to which it may apply, it is peculiarily the function of the trier of fact to determine whether a particular

instrument falls within or without the statutory category. This is a function to which the trier of fact is accustomed and one for which it is well suited. In this case, the trier of fact—the District Court—heard the case in the locale most closely associated with the instrument concerned, it heard the witnesses and assessed their credibility, and it witnessed the several demonstrations of the instrument. Under well-settled principles, this factual determination should not be disturbed on appeal unless found to be "clearly erroneous". *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. The rule applies as well to factual inferences drawn from undisputed basic facts. *Commissioner* v. *Duberstein*, 363 U.S. 278.

The taxpayer's evidence consisted of the testimony of four witnesses and three exhibits.[4] The taxpayer's summarization on brief (pp. 5–6) of their testimony is selective in character and the Government does not feel it necessary to repeat fully the other testimony of these witnesses, both on direct and cross-examination. The Government would, however, draw the Court's attention to certain additional parts of the testimony of the taxpayer's witnesses.

Mr. William Hong, the taxpayer's husband, testified that the taxpayer made three sizes of uli-ulis in her factory and that only the larger and more expensive ones were taxed. The third type, which was

[4] Exhibits 1 and 2 were two uli-ulis of the kind taxed (II–R.); by consent of counsel, a photograph was substituted for he instruments (II–R. 136). Exhibit 3 is a list of jobbers, wholesalers, and retail stores to whom the taxpayer sold ulilis. (II–R. 14–16.)

smaller and of a cheaper construction and which was designed for sale as "tourist souvenirs" was not taxed. (I–R. 20; II–R. 4, 11.) He stated that the gourds presently used came from Mexico and were inferior in sound to those previously obtained from Cuba. (II–R. 8.) He also stated that attempts were made to match uli-ulis in pairs according to sound. (II–R. 16.) He testified that the taxpayer sold her uli-ulis in part through her music store in conjunction with Hawaiian records. (II–R. 10.) When asked on cross-examination what the uli-uli was if it was not a musical instrument, Mr. Hong stated first that it was a "hula implement" but then added that its purpose was to produce sound. He conceded, however, that the taxpayer was not in the business of manufacturing noise-makers. (II–R. 18–19.) He did not feel qualified to testify whether the uli-uli produced a rhythmical sound, leaving that question to a musician or hula expert. (II–R. 20–21.)

Mr. Lloyd Krause, Musician-Bandmaster of the Royal Hawaiian Band, City and County of Honolulu, stated, among other things, on cross-examination as follows: He said that maracas are used in an orchestra and that maracas could be similar in size and appearance to the uli-ulis then in evidence. (II–R. 26.) He agreed that castanets were a musical instrument, that they were used by dancers as well as by members of an orchestra, that they produced the same rhythmical sound whether used by a dancer or by a percussionist in an orchestra, and that the dancers using castanets were playing from memorized

rhythms rather than from written scores. (II–R. 26–30.) He further agreed, after the uli-uli had been played for him by Mrs. Richards, who later testified for the Government, that what she produced was "a rhythmical sound". (II–R. 31.)

Mr. Roy Tanaka, a witness for the taxpayer, also conceded on cross-examination that, ignoring the adornment of feathers, the uli-uli would "look like maracas", that whether it was a musical instrument "depends how it is used", and that "it would sound like maracas". (II–R. 41, 42, 43.) He had earlier testified that he regarded the maracas as a musical instrument. (II–R. 41.) He had also testified that musical instruments did not lose their character as such merely because they had been decorated. (II–R. 41.)

Mr. Domenico Moro, the taxpayer's final witness, although not prepared to call the uli-uli a musical instrument, was willing to concede that castanets and tambourines—both of which are used by dancers—were musical instruments. Although the taxpayer's two prior witnesses had agreed, consistent with the Regulations, that maracas were musical instruments, Mr. Moro testified that he had never heard maracas played. (II–R. 56–57.)

The Government produced five witnesses and introduced two exhibits.[5] Mr. Martin Denny, a musician for over 25 years and a band leader since 1955 (II–R.

[5] Exhibit A was a copy of sheet music for "Hula Uli Uli" or "Alekoki", a composition for the uli-uli. (II–R. 121–123.) Exhibit B was a phonograph record containing a piece utilizing the uli-uli. (II–R. 134–136.)

58–59), testified that a member of his band played the uli-uli in a composition called "E li li'u e" or "Queen's Chant" (II–R. 61–62). Mr. Denny had recorded this piece and a recording of it was played for the District Court. (II–R. 62.) He testified that the uli-uli had a distinctive timbre and that it was the appropriate instrument for a Hawaiian piece such as the "Queen's Chant". (II–R. 65–66.) Mr. Denny stated that he had not used the instrument in any other orchestral arrangements. (II–R. 68.) Mr. Denny brought a maraca to court which was not introduced into evidence but which was observed by the trier of fact, and he testified that the maracas and the uli-uli were both of the "gourd family" and were "quite similar". (II–R. 63–64, 66, 77.)

Mrs. Eleanor Williamson, Assistant in Anthropology at the Bishop Museum (II–R. 79), testified regarding the research and taping of a slide and tape recording study entitled "Musical Instruments of Old Hawaii"; this study classified the uli-uli as a musical instrument (II–R. 80–82, 83–85). She also produced four books (Roberts, Ancient Hawaiian Music (1926); Brown, Hawaiian Life in the Pre-European Period (1940); Emerson, Unwritten Literature of Hawaii (1909); Buck, Arts and Crafts of Hawaii (1957)), and testified that they all described the uli-uli as a musical instrument. (II–R. 85–87.) The Roberts work also contained 23 pages of scores for the uli-uli. (II–R. 87.) Mrs. Williamson stated that she knew people owning uli-ulis who performed with them in the old ways. (II–R. 82.) She indicated that there were Hawaiian dances performed

with the uli-uli while kneeling or sitting. (II–R. 90.) She testified further that during the period 1955 through 1960 the uli-uli was for the most part used by dancers for rhythmical accompaniment and also by a small number of chanters. (II–R. 90–94, 96.)

Mrs. Dorothy Kahananui Gillett, an instructor in music at the University of Hawaii (II–R. 98), testified that she considered the uli-uli to be a musical instrument (II–R. 99, 115). She stated that it was capable of providing different rhythmical sounds or patterns. (II–R. 102.) She identified a German dictionary of musical instruments (Sachs, Real Lexicon Der Musik Instrumentes) as being recognized as a leading authority in the field.[6] (II–R. 103–104, 107.) A translator (Mr. Siegfried Ramler) was sworn (II–R. 104–105) and he translated the entry for uli-uli as follows (II–R. 105):

> Mr. RAMLER. Uli uli, Hawaii, vessel-type rattle.
> The COURT. What kind?
> Mr. RAMLER. A vessel-type rattle out of a calabash filled with pebbles which rhythmically accompany songs * * *.

Mrs. Gillett testified that the uli-uli was used primarily by dancers but that on one occasion she had had a group of children record a chant using uli-ulis. (II–R. 108, 109.)

Mrs. Edwina K. Mahoe, who was formerly employed as a hula and music instructor by the Department of

[6] Contrary to the apparent assertion of the taxpayer (Br. 7), Mrs. Gillett testified that the dog tooth anklet was not included in Mr. Sachs' dictionary of musical instruments. (II–R. 114, 116.)

Parks and Recreation and who participated in the preparation of the slide and tape study (II–R. 117), testified that she considered the uli-uli to be a musical instrument (II–R. 118–119). She stated that there were many hulas which were performed in the kneeling position and in which the primary emphasis was placed on the uli-uli rather than on the movement of the body. She stated that she taught this to children. (II–R. 119–120.) Mrs. Mahoe demonstrated a hula uli-uli and sang in Hawaiian. (II–R. 120–121.) She testified that she regarded a hula dancer as performing a musical composition, albeit an unwritten one, as well as performing a dance. (II–R. 124, 125, 126.)

Finally, Mrs. Saneta Richards, a graduate student in ethnomusicology at the University of Hawaii, stated that in her opinion the uli-uli was a musical instrument, that it was suitable for performing musical compositions, that it was capable of producing different rhythmical patterns, and that it was similar in a broad sense to a maraca. (II–R. 127–129.) Never having previously seen it, she played the score represented by Exhibit A. (II–R. 129–130.) She stated that she had seen the uli-uli used principally by dancers. (II–R. 131.)

In brief summary, there was evidence before the District Court that the uli-uli is used to provide rhythm, a basic component of music (II–R. 102), to accompany a hula (II–R. 13, 23, 35–36), a chant (II–R. 61–62, 90, 93–96, 119, 120), or a song (II–R. 120–121). During the years in question, it was predominately used by hula dancers rather than non-dancing musi-

cians. It was used to provide a rhythmical accompaniment (II–R. 18, 90–91, 121, 126) and a visual aspect (II–R. 18) to the dance. The instrument has been used, at least occasionally, in orchestral arrangements (II–R. 61–62) and has been used on commercially-sold phonograph records (II–R. 61–62; Ex. B, II–R. 135–136).

The uli-uli is recognized as a musical instrument by historical works on the musical instruments of old Hawaii and a reference work. (II–R. 85–86, 103–105.) It is regarded as a musical instrument by students and experts in the field of music. (II–R. 99, 118–119, 128.)

In musicology, the uli-uli is defined as a percussive instrument of indefinite pitch, a classification which also includes such instruments as castanets, maracas, cymbals, triangles, the bass drum, etc. (II–R. 29, 57, 99, 101–102.) The uli-uli is also classified, according to acoustical principles, as an idiophonic instrument, a classification which also includes maracas and castanets. (II–R. 101.)

The uli-uli is similar in construction, character, and use to maracas, except that maracas are more often used by members of a band or orchestra than by dancers. (II–R. 26–27, 37–38, 41, 43, 63–64, 77.) The uli-uli is suitable for, and is used in, performing musical compositions both written and unwritten (II–R. 77, 106, 119; Ex. A, II–R. 121–122), and it is suitable for use in, and is used in, instructing in music (II–R. 106, 119).

The District Court correctly held that uli-ulis are musical instruments. As the court noted (II–R. 142–143):

> It certainly must produce sound. If it weren't used to produce sound, I don't think it would be used, particularly in these hulas.
>
> It produces, certainly, a very distinctive rhythm; * * * the effect is musical and music that is composed partly of rhythm * * *.
>
> * * * this particular sound * * * does have the sound of a musical rhythm, and is always used in connection with a musical cadenza or musical rhythm; certain types of timing which are distinctive to Hawaiian hulas used in 1955 and today.

The uli-uli is very similar in use, construction, and musical quality to maracas which are expressly treated by Section 40.4151–1(c) as musical instruments. Uli-ulis are used principally by dancers to provide rhythm for their dance in the same way castanets are used by Spanish dancers. Section 40.4151–1(c) similarly treats castanets as musical instruments. See also Rev. Rul. 54–331, 1954–2 Cum. Bull. 410 (maracas and castanets are musical instruments under the 1939 Code).

The taxpayer's argument that the uli-uli cannot be a musical instrument because it is primarily used by a dancer and therefore is incapable of being used to play a musical composition is fallacious. They are in fact used to produce music; they are used, as the District Court found (I–R. 26), to provide a rhythmical accompaniment to a hula. The uli-ulis

nvolved are not inferior in construction and design; hey are the genuine instrument, not a toy or novelty imulating one; they are, as the District Court found I–R. 26–27), musical instruments and that finding s plainly correct.

B. The District Court applied the proper standard to the facts

Under Section 40.4151–1(c) of the Regulations, the tatutory term "musical instruments" is defined as ncluding "all * * * percussion * * * instruments ısed to produce music", but not "articles in the ıature of toys or novelties which simulate musical nstruments and which are unsuitable for use in playng musical compositions or in teaching music." Vhile the Regulations expressly characterize some hirteen instruments as musical instruments, they eave to the Commissioner and to the courts the task f determining whether other instruments are inluded or not. Consistency and the canon of *ejusdem eneris* require that instruments similar to those ıentioned in the Regulations be similarly treated. 'his requires consideration of a number of factors, uch as primary purpose for which designed, ordiary use, construction, musical tradition, capability or use in playing musical compositions and usefuless in teaching music, and the opinion of experts in ıe field of music. Due to the great number of ıstruments to which the statute may apply, these ıctors are not all inclusive and no one of them is eterminative. The factors applicable to a given ıstrument and the relative weight to be accorded ıem by the trier of fact will vary from instrument

to instrument. The decision of a specific case, co sequently, is a matter of degree and judgment.

While there has been no great body of judici decision to consider what factors are pertinent an what relative weight is to be accorded to them,[7] th Commissioner has adopted this approach in sever Revenue Rulings. Rev. Rul. 58–509, 1958–2 Cu Bull. 801 (polystyrene guitars—toys); Rev. Ru 58–540, 1958–2 Cum. Bull. 802 (plastic castanets– musical instruments); Rev. Rul. 62–44, 1962–1 Cu Bull. 209 (testing tools—toys or novelties); Rev. Ru 63–237, 1963–2 Cum. Bull. 509 ("junior" drums an tambourines—musical instruments).

In its oral opinion, the District Court considere the musical background of the uli-uli, its use, it musical qualities, its decoration, and the opinion o students and experts in the field of music. It als referred to what it believed would be the layman' view. (II–R. 141–145.) In its formal findings o fact, the court also referred to the musical classifica tion of the uli-uli, its treatment in a recognized dic tionary of musical instruments and its capabilities fo teaching music and playing musical compositions (I–R. 26.)

The taxpayer, however, contends that the Distric Court used erroneous criteria. (Br. 12–15.) In thi attack on the findings and conclusions of the Distric Court, she places the greatest reliance on the refusa

[7] Nor is there likely to be. The excise tax on musical instru ments was repealed, effective June 22, 1965, by Section 204 o the Excise Tax Reduction Act of 1965, P.L. 89–44, 79 Stat. 136

of the court to consider as dispositive the fact that the uli-uli is primarily used by hula dancers to provide a rhythmical accompaniment to their dancing—a point which is reflected throughout the taxpayer's brief. Seizing upon the reference to "musical compositions" in the Regulations, the taxpayer contends that an instrument primarily used by a dancer cannot be a musical instrument since it is not used to play "musical compositions", i.e., what the taxpayer defines as something played by a non-dancing musician from a written score.

This argument ignores the essential requirement of the Regulations—that the instrument must be used to produce music, including rhythm. If articles used by dancers are musical instruments, they do not cease to be so because they are used primarily by dancers rather than seated members of a band.[8]

The reference to musical compositions in the Regulations on its face applies to the determination whether the article in question is a toy or novelty which simulates a musical instrument—an article having such imitations of design or construction that it cannot fulfill the function of the genuine instrument. The

[8] The taxpayer would apparently distinguish castanets on the grounds that they are used by members of the orchestra as well as by dancers. (Br. 14.) Presumably she would make the same distinction for tambourines (no matter how decorated or tasselled that instrument might be when used by dancers). And the taxpayer would overlook the fact that the maracas, although played by a member of the orchestra, do for the rumba dancer precisely what the hula dancer does for herself with a uli-uli—provide accented rhythmical accompaniment.

Regulations thus would distinguish a toy piano from the genuine instrument. In the context of this case, the Regulations were applied when the Commissioner did not tax "uli-ulis of an inferior quality and smaller size which were designed for sale as 'tourist souvenirs' and which the Commissioner did not deem suitable for use in playing musical compositions." (I–R. 20.) In any event, if a musical composition, written or unwritten, need be found, that requirement has been fulfilled in this case; the instrument is used to provide a rhythmical accompaniment to the dance.

The taxpayer also contends that the District Court erred in relying on the treatment of the uli-uli in historical materials on old Hawaii. (Br. 13.) Of course, the historical use of an instrument should not be the determinative factor, but this is hardly to say that it should be totally ignored. It provides information on the uses and capabilities of the instrument, its construction, and its cultural background. Cf. *Peroxide Chemical Co.* v. *Sheehan,* 108 F. 2d 306, 308 (C.A. 8th). Moreover, even if the court erred in referring to this material (which we hardly concede), it was surely harmless error in view of the preponderance of other evidence which pointed in the same direction.

The other points advanced by the taxpayer are quickly considered. The court, in its oral opinion, mentioned among other things the view of the man on the street. (Br. 15.) This is surely not improper. Section 4151 and the Regulations utilize ordinary

words in referring to the articles to be taxed; as the Supreme Court noted in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617–618:

> After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Moreover, it would seem that the laymen's view is of special interest in this case where the instrument has such a unique connection with the locale in which it is used.

It was also not improper for the District Court to refer to the authoritative dictionary on musical instruments, Sachs, Real Lexicon Der Musik Instrumente. (Br. 13–14; II–R. 103–105.) Courts customarily refer to dictionaries and other reference works for definitions. *Commerce-Pacific, Inc.* v. *United States,* 278 F. 2d 651, 654 (C.A. 9th); *Herring Magic* v. *United States,* 258 F. 2d 197 (C.A. 9th). Finally, the court did not rely on Congressional affirmation of outstanding administrative interpretation. This so-called criterion (App. Br. 12) was neither discussed in the court's oral opinion (II–R. 141–145) nor in its findings of fact (I–R. 26); and in any event, this matter does not seem of consequence since the taxpayer has never questioned the validity of the Regulations under which she seeks to bring herself.

C. The District Court correctly admitted evidence of the historical back ground of the instrument

During the course of the trial, the District Cou admitted evidence concerning the musical traditio of the uli-uli. The Government showed a slide an tape study entitled "Musical Instruments of Ol Hawaii" which was prepared by the Bishop Museu and the University of Hawaii. (II–R. 80–84, 117 118.) One of the witnesses for the Government testi fied concerning the contents of four books (Roberts Ancient Hawaiian Music (1926); Brown, Hawaiia Life in the Pre-European Period (1940); Emerson Unwritten Literature of Hawaii (1909); and Buck Arts and Crafts of Hawaii (1957)). (II–R. 85–87.) The slide and tape study and the four books describe the uli-uli as a musical instrument. In addition, th Roberts book contained 23 pages of scores for th uli-uli.

The taxpayer objected to the admission of thi evidence on the ground that it related to a perio prior to the taxable period in question, 1955 through 1960. The District Court overruled the objections (II–R. 81–85, 87.) The taxpayer contends that these rulings constitute error. (Br. 3, 6–7, 13.)

The court correctly admitted this evidence. It identifies the customary use of the instrument as well as the musical tradition of which it is a part. While such evidence may not be determinative of the ultimate issue of whether an instrument is a musical instrument, it is a factor which the trier of fact was

ntitled to consider along with a number of other fac-
ors. The evidence is relevant to the question of cus-
omary use as well as to a general understanding of
he nature and function of the instrument.[9] Cf. *Per-
xide Chemical Co.* v. *Sheehan,* 180 F. 2d 306, 308
C.A. 8th).

Moreover, since the trier of fact was a judge ex-
erienced in weighing evidence, the need for strict
ompliance with the exclusionary rules of evidence
vas considerably less than it would have been had the
rier of fact been a jury. The admission of improper
vidence even before a jury ordinarily will not be
rounds for reversal so long as there is competent evi-
lence to support the findings. *Pursche* v. *Atlas
craper & Engineering Co.,* 300 F. 2d 467, 487–488
C.A. 9th), certiorari denied, 371 U.S. 911; *Lessman
. Commissioner,* 327 F. 2d 990, 996–997 (C.A. 8th).
n this case there was, we submit, no error in the ad-
ission of the evidence. Even if there was, the
bundance of other evidence supporting the findings
nd conclusions of the District Court, sitting without
jury, would hardly make the reception of this evi-
ence reversible error.

[9] This is particularly true here since there was evidence that
uring the period in issue the uli-uli was being used in the
raditional fashion as well as in the modernized hula, and there
as certainly no evidence showing that the uli-ulis of the tax-
ayer were not being used by both groups. (II–R. 82, 89–90,
, 119–120.)

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APRIL, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney.

Dated: This —— day of April, 1966.

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